No. 87-668

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In the Supreme Court of the United States

OCTOBER TERM, 1987

CHELSEA LABORATORIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner had timely notice of the General Counsel's theory of unfair labor practice liability and a full and fair opportunity to litigate the charge.

2. Whether substantial evidence supports the National Labor Relations Board's finding that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging an employee for engaging in protected concerted activity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is reported at 825 F.2d 680. The decision and order of the National Labor Relations Board (Pet. App. 11a-16a), including the decision and recommendation of the administrative law judge (Pet. App. 17a-26a), are reported at 282 N.L.R.B. No. 74.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1987. The petition for a writ of certiorari was filed on October 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For a number of years, and until March 12, 1985, Local 918 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

(Local 918), was the certified bargaining representative of petitioner's employees (Pet. App. 5a; C.A. App. 90). In October 1984, because of employee dissatisfaction with Local 918, Jose Velez, the shop steward, filed a decertification petition with the National Labor Relations Board (Pet. App. 5a). On November 30, 1984, the Board conducted a decertification election in which Kismath Sooknanan, a member of Local 918's employee negotiating committee, served as Valez's observer (*ibid.*). A majority of petitioner's employees voted against continued representation by Local 918 (*ibid.*).

Local 918 filed timely objections to the election (Pet. App. 12a, 18a). While these objections were pending, petitioner's employees received a letter from the president of petitioner's parent corporation thanking them for rejecting union representation, stating that they were now covered by petitioner's insurance plans, and indicating that, "[i]n the near future, you will be getting more specific information as to what your wage increase will be" (*id.* at 12a, 19a). Contemporaneously, Velez and Sooknanan learned that petitioner needed employees to work overtime and offered to attempt to persuade employees to do so (*id.* at 18a-19a). At the same time, however, they asked petitioner's vice-president whether petitioner would recognize Local 815, another Teamsters-affiliated local, after the decertification of Local 918 became final (*id.* at 19a). The vice-president did not know the answer to their question but promised to bring the matter to the attention of petitioner's board of directors (*ibid.*). Sooknanan and Velez then met with the employees, asked them to do the needed overtime work, and told them to await the decertification of Local 918, at which time Local 815 could begin representing them (*ibid.*). The employees agreed to do so (*ibid.*).

Subsequently, in December 1984, representatives from the employee negotiating committee, including

Sooknanan, spoke with petitioner's president, Nat Getrajdman, about their request that petitioner recognize Local 815 after Local 918 was finally decertified (Pet. App. 13a, 19a). During this conversation, Sooknanan also indicated that the employees were dissatisfied because they had not received the wage increase that they had been promised (*id.* at 13a). Getrajdman indicated that he could not provide any answers to the employees' questions, but promised that there would be a "dialogue" before any decisions were made (*ibid.*). Velez and Sooknanan then met with the employees, reported the contents of their conversation with Getrajdman, and told the employees to have patience (*ibid.*).

In early February 1985, a few employees told Sooknanan that they had heard that Local 918's objections had been overruled by the Board (Pet. App. 20a). Sooknanan asked Getrajdman whether the objections had been overruled, but Getrajdman indicated that he did not have an answer (*ibid.*). A few days later, a supervisor told several employees that the objections had in fact been overruled, that Local 918 had filed an appeal, and that there would be no raise until Local 918's appeal had finally been decided (*ibid.*). Nevertheless, on February 19, 1985, petitioner's employees received a letter from petitioner's parent corporation indicating that they would receive a wage increase, effective February 22, 1985, retroactive to December 1984, and that they would become participants in petitioner's profit sharing plan (*ibid.*). The letter also thanked the employees for having decided "to join the over eighty (80%) percent of the workforce in the United States that is non-union" (*ibid.*). In light of petitioner's earlier representations about wage increases and union representation, the letter caused considerable confusion among petitioner's employees (*ibid.*).

Accordingly, Sooknanan and Velez went to Getrajdman's office to inquire about the letter's meaning (Pet.

App. 20a). Velez asked whether Getrajdman knew about the letter, and Getrajdman said that he did (*ibid.*). Sooknanan complained that Getrajdman had promised to hold "a dialogue" before any decision about union representation was made, but Getrajdman answered that, "[w]hatever the letter says, that is what is going to be" (*id.* at 20a-21a). Sooknanan asked, "what are you trying to do, push things down people's throats?" (*id.* at 21a). Getrajdman responded that he did not want to speak to anyone from the employee negotiating committee, to which Sooknanan objected that Getrajdman should have taken that position in the first place (*ibid.*). By this time, both men had raised their voices and Getrajdman said, "you cannot speak to me that way, I'm the President" (*ibid.*). Getrajdman then fired Sooknanan and ordered him out of the office (*id.* at 6a).

2. Sooknanan filed an unfair labor practice charge with the Board, and the General Counsel issued a complaint alleging that Sooknanan's discharge violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) (Pet. App. 14a). The complaint alleged that Sooknanan had been discharged for protesting petitioner's grant of a wage increase while objections to the decertification election were pending, and for engaging in "other concerted activity" (*id.* at 14a; C.A. App. 90, 91).

a. After a hearing, an administrative law judge (ALJ) agreed that petitioner had violated Section 8(a)(1) by discharging Sooknanan (Pet. App. 11a, 24a). The ALJ found that "Sooknanan believed that the granting of a wage increase showed that everything was 'final'[,] * * * that 'the company did not recognize anybody,' " and that this "constituted a breach of the commitment to talk to the people before reaching a decision on recognizing Local 815" (*id.* at 21a). The ALJ further found that, "[m]anifestly, Sooknanan was engaging in concerted activities when he asked Getrajdman in the presence of shop steward

Velez and on behalf of other employees about the seeming contradiction between [petitioner's] letter and Getrajdman's earlier promises" (*id.* at 23a). And the ALJ finally found (*ibid.*) that Sooknanan had been "fired * * * for continuing to raise the issue," that "Sooknanan did not lose the protection of the Act by raising his voice," that "Getrajdman also raised his voice," that, "in contrast to the cases cited by [petitioner], Sooknanan did not use obscenity or violence," and that petitioner's records indicated that "employees who push their supervisors in anger are merely warned and not suspended or discharged."

The ALJ then rejected petitioner's claim that it had not been given notice by the complaint of the General Counsel's theory of violation (Pet. App. 23a; C.A. App. 82, 154). The ALJ found that, "[a]lthough the complaint condenses the transaction by describing it as a 'protest' about the announcement of a wage increase, it was manifest throughout the instant hearing what Sooknanan's complaint had been," to wit, that Getrajdman "had broken his promise to speak to the employees before any decision was reached about recognizing a union" (Pet. App. 23a).

Finally, the ALJ rejected (Pet. App. 23a-24a) petitioner's contention that, because Sooknanan was fired for insisting that petitioner bargain with one union while another was the certified representative of the employees, his conduct was unprotected under this Court's decision in *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50 (1975). In the ALJ's view, petitioner's contention simply "d[id] not fit the facts" of the case (Pet. App. 24a). She said that "Sooknanan was not demanding bargaining over the wage increase nor was Sooknanan demanding that [petitioner] bargain with Local 815"; "[r]ather, he was asking Getrajdman about his promise to discuss the issue of recognition with the employees before any decision was made" (*ibid.*). She concluded that

"[t]here is no way this inquiry as to [petitioner's] future actions can be construed as a present demand for bargaining" (*ibid.*).

b. The Board adopted the decision and recommendation of the ALJ (Pet. App. 11a-16a). It determined that the facts "which provide the basis for the judge's finding that Sooknanan was engaged in protected concerted activity at the time he was discharged[] were fully litigated at the hearing" (*id.* at 14a) and that petitioner "does not * * * claim that it was precluded from presenting exculpatory evidence, nor does it argue that it would have altered the conduct of its case at the hearing in any particular" (*id.* at 15a). Indeed, the Board noted, petitioner's brief to the Board addressed "the law and the sufficiency of the facts * * * in the record with respect to the protected concerted nature of Sooknanan's protest of the [petitioner's] breach of promise regarding the dialogue" (*ibid.*). Accordingly, "as [it] f[ou]nd that the theory was encompassed in the complaint and that all the operative facts underlying the [Section] 8(a)(1) finding [were] present in the record," the Board rejected petitioner's "argument that variance provides a b[illegible]s for [reversal] in this case" (*ibid.*).

3. The court of appeals upheld the Board's findings and enforced its order (Pet. App. 3a-10a). Initially, the court rejected petitioner's claim that the Board's decision "was based on a theory not contained in the complaint" (*id.* at 7a), reasoning that petitioner "addressed the legal issues [raised by the "dialogue" theory] as early as its first answer to the NLRB's complaint," and that petitioner "did not object to the ALJ's factual findings on review before the Board" and thus could not do so for the first time on appeal (*id.* at 7a-8a).[1] It then found substantial evidence to

[1] The court also rejected (Pet. App. 7a) petitioner's claim that, given timely notice, it would have been able to challenge the factual predicate of the "dialogue" theory – that is, that the employer actually

support the Board's finding (a) that Sooknanan's conduct did not merit discharge for rudeness or insubordination (*id.* at 8a) and (b) that Sooknanan was engaging in "concerted activity" when he met with Getrajdman (*ibid.*). Finally, it rejected petitioner's argument "that Sooknanan's activity, even if concerted, was not protected because Sooknanan's request for a dialogue was an attempt to undermine the existing collective bargaining representative" (*id.* at 9a), emphasizing that Sooknanan "was merely insisting that the employer adhere to its promise to talk with the employees about a new local, after the prior local's decertification process was complete" (*id.* at 10a), and that Sooknanan's activities were not "inconsistent with the existing grievance mechanism" (*ibid.*).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner initially errs in suggesting (Pet. 6-8) that there is a conflict among the circuits as to whether the Board may properly find a violation on a theory that was not expressly pleaded in the complaint. It has long been settled that a failure to plead a theory of violation expressly in the complaint does not preclude the Board from finding such a violation where the respondent has had adequate notice of the charge and an opportunity to litigate the issue fully and fairly. See *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-350 (1938); *NLRB* v. *Coca-Cola Bottling Co.*, 811 F.2d 82, 87 (2d Cir. 1987); *NLRB* v. *Int'l Ass'n of Bridge Workers, Local 433*, 600 F.2d 770, 775 (9th Cir. 1979), cert. denied, 445 U.S. 915 (1980); *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157,

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had promised a dialogue. The court observed (*ibid.*) that Sooknanan's belief in the promised dialogue need not have been correct for his inquiry to be concerted and protected under the Act.

1161 (5th Cir. 1977); *J.C. Penney Co.* v. *NLRB*, 384 F.2d 479, 482-483 (10th Cir. 1967). The decisions of the other courts of appeals that petitioner cites are in accord; they simply represent instances in which the responding party did not have either actual notice of the claim or a full and fair opportunity to litigate the claim at the hearing. See *NLRB* v. *Quality C.A.T.V., Inc.*, 824 F.2d 542, 545, 547 (7th Cir. 1987); *NLRB* v. *Complas Industries, Inc.*, 714 F.2d 729, 734 (7th Cir. 1983); *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1102-1106 (1st Cir. 1981); *NLRB* v. *Homemaker Shops*, 724 F.2d 535, 542-544 (6th Cir. 1984); *Stokely-Van Camp, Inc.* v. *NLRB*, 722 F.2d 1324, 1331 n.11 (7th Cir. 1983); *NLRB* v. *Blake Construction Co.*, 663 F.2d 272, 279-282 (D.C. Cir. 1981); *NLRB* v. *Pepsi-Cola Bottling Co.*, 613 F.2d 267, 273-274 (10th Cir. 1980); *Drug Package, Inc.* v. *NLRB*, 570 F.2d 1340, 1345 (8th Cir. 1978).[2] In this case, of course, petitioner

[2] Thus, in *Quality C.A.T.V., Inc.*, 824 F.2d at 547, the court found that the issue of protest because of discomfort, as opposed to unsafe conditions, was not "fully and fairly litigated"; in *Stokely-Van Camp*, 722 F.2d at 1331-1332, the court, in dictum, found that the respondent was not informed of an unpleaded charge in time to prepare a defense; in *Soule Glass & Glazing Co.*, 652 F.2d at 1102, the court found that the respondent had not been on notice during the hearing of certain unpleaded charges and that the deficiency could not be overcome after the hearing's close by arguments in the General Counsel's brief; in *Homemaker Shops*, 724 F.2d at 544, the court found that amendment of a complaint just prior to the Labor Day weekend did not give the respondent a fair opportunity to locate, interview, and secure attendance of witnesses, and in the circumstances, the allegation was not fully and fairly litigated; in *Blake Construction Co.*, 663 F.2d at 282, the court found that the General Counsel had not made clear his theory of the case and the respondent did not actually litigate his defenses; and in *Drug Package, Inc.*, 570 F.2d at 1345, the court found that the unalleged violation was not fully litigated because the respondent was unaware of the possibility of the retroactive remedy that would flow from it.

was aware of the theory of violation well before the hearing commenced and had a full and fair opportunity to present its defenses to the charge (Pet. App. 7a). Thus, the decision below is consistent with all prior precedent.

2. Petitioner's remaining contentions raise only evidentiary issues that do not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Petitioner's assertion (Pet. 9-12) that Sooknanan's conduct constituted "personal griping" merely takes issue with the Board's finding, upheld by the court of appeals, that Sooknanan was acting on behalf of other employees (Pet. App. 8a, 11a, 23a-24a). Likewise, petitioner's suggestion (Pet. 12-13) that Sooknanan's allegedly rude response to Getrajdman should not be protected only quarrels with the Board's finding, upheld by the court of appeals, that Sooknanan was not acting independently or in derogation of the bargaining relationship (Pet. App. 8a-11a, 23a-24a). Finally, petitioner's claim (Pet. 13-15) that the decision below is at odds with this Court's decision in *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 61-70 (1975), which held that employee attempts to bypass a certified union and bargain over the terms and conditions of employment violate the statutory principle of majority rule and thus are not protected by Section 7, 29 U.S.C. 157, is incorrect for the same reason: the Board found, and the court of appeals agreed, that Sooknanan had made no present demand for bargaining or recognition and that his request for a discussion in the event of decertification was not destructive of the old union's status (Pet. App. 10a, 24a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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